United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1118

To be argued by
JOHN NICHOLAS IANNUZZI
and MICHAEL N. KLAR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1118

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRANK COTRONI and FRANK DASTI,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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2. In any event, does the totality of the circumstances require the application of United States wiretap policy?

3. Was the wiretapping and the revelation of its product violative of then existing Canadian law?

4. Was the revelation of the product violative of present Canadian law, even though the wiretapping itself preceded existing legislation?

5. If question 3 or 4 is answered affirmatively, should the wiretap evidence have been excluded in a federal trial upon the principle of judicial integrity and as a matter of due process?

6. Should the wiretap evidence have been excluded due to the selective destruction of much of the other wiretap products, and due to the refusal of the Canadian Police to disclose many of the existing recorded and/or summarized wiretapped conversations?

7. Should the wiretap evidence have been excluded due to the government's dilatory tactics in withholding the wiretap material until shortly prior to trial?

8. Under the circumstances of this case, was it error for the trial court to permit double hearsay evidence of a speculative sort for the purpose of establishing a connection between this alleged cocaine conspiracy and a certain New York narcotics ring? Was the error conclusively fatal in that the same evidence unfairly tended to indicate that these defendants were planning to send a substantial quantity of heroin to the United States?

9. Were the defendant Dasti and his wife deprived of their marital privilege by the use against him of intercepted telephone conversations with his wife, who is not alleged to have been a party to any criminal conduct?

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APPELLANTS' BRIEF

Preliminary Statement

Frank Cotroni and Frank Dasti appeal from a judgment of conviction entered against them on March 24, 1975, after a jury trial before the Honorable Jacob Mishler in the United States District Court for the Eastern District of New York.

On October 9, 1973, an indictment, numbered 73 Cr. 898, was filed in the Eastern District of New York. The indictment was in two counts. Count I charged a conspiracy to import cocaine into the United States for the purpose of sale (21 U.S.C. §§ 173 and 174). The conspiracy was alleged to have existed from December 1, 1970 to April 30, 1971. Frank Cotroni, Frank Dasti, Guido Orsini, Paul Oddo, Jorge Asaf y Bala, and Claudio Martinez were named as defendants. Guiseppe Catania, who testified as a witness in behalf of the government at

the trial herein, was named as an unindicted co-conspirator. Count II charged that each of the above named defendants, "did receive, conceal and facilitate the transportation and concealment of approximately 9 kilograms of cocaine" on January 10, 1971 within the Eastern District of New York.

Pursuant to the above noted indictment, the government successfully instituted extradition proceedings against the defendant Cotroni, a resident of Canada, and Cotroni was brought before the District Court on October 23, 1974. Following a hearing with regard to the legality and competency of wiretap evidence, the trial against the defendants Cotroni and Dasti commenced on January 6, 1975.*

The trial terminated on January 21, 1975, with verdicts of guilty as against Cotroni and Dasti with respect to both counts of the indictment.

On January 24, 1975, the defendant Cotroni was sentenced to concurrent terms of imprisonment for a period of fifteen (15) years with respect to Counts I and II, and was ordered to pay a fine in the amount of $20,000.00 (Twenty Thousand Dollars) with respect to Count I. The defendant Dasti was sentenced to concurrent terms of imprisonment of fifteen (15) years with respect to Counts I and II, to run concurrently with a prior sentence of imprisonment imposed upon him in the District of New Jersey.

Defendant Cotroni has been, and continues to be, incarcerated on these charges since the date of his extradition to the United States from Canada.

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* Defendant Oddo was severed from the trial due to his ill health. As far as is known, the defendants Orsini, Bala, and Martinez have never been brought within the jurisdiction of the Court.

Statement of Facts

A. Introduction.

The indictment herein charged that Frank Cotroni, Frank Dasti, Guido Orsini, Paul Oddo, Jorge Asaf y Bala and Claudio Martinez [all hereinafter referred to by their last names], between the 1st day of December, 1970 and the 30th day of April, 1971, did conspire to import nine (9) kilograms of cocaine into the United States. The said contraband was allegedly brought into the United States on January 10, 1971. Guiseppe Catania was named in the indictment as an unindicted co-conspirator.

Cotroni, Dasti, and Orsini are residents of Montreal, Canada. Neither Cotroni nor Orsini was shown to have been in the United States during the period with which the indictment is concerned, although the trial proof did show that Cotroni made two non-stop trips from Canada to a rented vacation house in Mexico during that time. Catania, Bala and Martinez were residents of Mexico.

The theory of the government's case, based upon the testimony of Catania, may be summarized as follows: by December, 1970, Bala and Catania had already consummated many substantial drug transactions together. At a meeting in Mexico City, Bala allegedly asked Catania if he knew anyone who might be interested in approximately ten (10) to twelve (12) kilos of cocaine. At that time, Cotroni was about to arrive in Mexico on vacation. Catania knew Cotroni, within a strictly legitimate business and social context, for a number of years, and neither man had any reason to believe that the other had any interest in the narcotics traffic. However, Catania allegedly mentioned the cocaine offer to Cotroni. When Cotroni returned to Canada, for the funeral of a relative, he allegedly conveyed the offer to Dasti, and it was accepted.

Thereafter, Martinez allegedly transported nine (9) kilograms of the drug to Dallas, Texas (the rest had, meanwhile, been sold). He was met by Catania on January 9, 1971. On January 10, the two men went to New York and met with Dasti who had arrived from Montreal on that day. Dasti allegedly directed Catania and Martinez to make delivery of the drug to a certain hotel room in New York. Catania did so, and the person to whom he made the delivery was Oddo.

According to Catania, difficulties arose thereafter with regard to the payment for the drug. It was claimed that part of the cocaine had undergone some type of change which caused it to be brownish. As a result, payment was slow in coming, was made in installments, and never, in fact, came to the previously agreed price.

Although never mentioned in the indictment, nor referred to in the reams of discovery material turned over to the defense prior to trial, the government was permitted over vigorous objection, to adduce proof, toward the end of its case, with regard to the ultimate destination of the cocaine and an alleged future plan for the conspirators to traffic in heroin. Toward this end, the government spread before the jury the so-called Bynum organization, *see*: *United States* v. *Bynum*, 485 F.2d 490 (2d Cir., 1973). In this widespread scenario, Oddo was supposed to be working in New York with one Vincent Altamura, and Altamura allegedly turned over five (5) kilos of the cocaine to Joseph Cordovano, one of Bynum's confederates. In order to establish these last events, the government called as a witness George Stewart, the same undercover informant who had been the chief government witness at the Bynum trial.

Stewart testified in this case that he had no knowledge whatsoever of Cotroni, Dasti, Catania, Bala, Oddo, Orsini or Martinez. Yet the government sought, by

hearsay upon hearsay, to establish a circumstantial pattern indicating that five (5) kilos of the nine (9) kilo shipment * ultimately came into the possession of Stewart and other Bynum confederates during the early morning hours of January 11, 1971.

The following chain, therefore, depicts the path of the cocaine according to the government's theory:

Bala to Martinez to Dasti to Oddo to Altamura to
Cotroni
Orsini
Cordovano to Bynum to Stewart
Others

For an extensive period of time, beginning long before and continuing far after the facts of this case, Cotroni, Dasti, Orsini, and other Canadians were the subjects of constant wiretapping by the Canadian government. The extent of that wiretapping is more fully described *infra*, at p. 7 and in Tables "A" and "B" at pp. 1a-2a of this brief. Agents of the United States Drug Enforcement Administration, stationed in Canada, were permitted to have full, contemporaneous, and continuous access to the then on-going wiretapping. At the same time, the United States agents also participated with the Canadian authorities in visual surveillances of the subjects. The details of all these Canadian surveillances—electronic and otherwise—formed a continuous stream of information to the DEA agents and agencies in the United States. In January, 1971, the very time of the alleged transfer of the 9 kilos of cocaine herein, when Dasti travelled to New York, DEA agents in Canada alerted DEA agents in New York to keep Dasti under twenty-

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* Stewart testified the shipment was actually to be 24 kilos of cocaine, without it ever being explained how the original 9-12 kilos Catania allegedly sold multiplied to 24 kilos of pure cocaine.

four hour surveillance. The same applied to Cotroni's travels in Mexico. (Despite the twenty-four hour surveillance of Dasti on the day of the alleged transfer, notably, none of the agents ever saw Catania or Martinez —alone or with Dasti). At the trial, the government utilized the products of these surveillances in an effort to corroborate Catania's testimony.

No argument is made in this brief with regard to the sufficiency of the evidence. Catania's testimony, if believed by the jury beyond a reasonable doubt, would have required a guilty verdict. However, in view of Catania's background and his admitted motivation to avoid a heavy prison sentence, there can be little doubt that the wiretaps added great weight in swinging the balance in favor of conviction. Similarly, in view of the serious and somewhat dramatic nature of the facts of this case, it is quite likely that the other errors of which we complain have also done likewise.

Arguments are presented, therefore, with regard to: the legality and the admissibility of the wiretap evidence, and the fruits thereof (Point I); the competency of the wiretap evidence in view of the facts that many of the recordings of the wiretapped conversations were destroyed prior to trial and other, preserved recordings were not made available to the defense at trial (Point II); the unfairness of the disclosure procedures followed by the government in view of the short period of time allotted to the defense to prepare for trial (also Point II); the unfairness of the use by the government of the Stewart-Bynum line of proof (Point III); the use of evidence against the defendant Dasti in violation of his marital privilege (Point IV).

B. The Electronic Surveillance and Pre-trial Disclosure.

Commencing on July 7, 1970, Canadian police authorities subjected the home, business and other telephones utilized by the defendants herein to an extended net of electronic surveillance. This wiretapping project was given the code name "Vegas". As will hereinafter be described, shortly before trial the government disclosed some of the details of that surveillance to the defense. The *disclosed* wiretaps, their duration and location, are set forth in Table "A", *infra*, p. 1a.

It should be noted that certain numbers are missing from the disclosed Vegas taps. Missing, without explanation, are Vegas 2, Vegas 6, and Vegas 10. These, and perhaps other taps, were apparently not turned over to the government by the Canadian police, pursuant to the non-disclosure policy discussed in Point II, *infra*.

At trial, the government introduced into evidence recordings and transcripts of seventeen (17) of the conversations which had been obtained by means of the taps. Additionally, the government introduced into evidence sixteen (16) summaries of other conversations as to which the recordings had previously been destroyed and no transcript existed. A chart listing all thirty-three (33) conversations is set forth in Table "B" *infra*, p. 2a.

This brief raises serious questions concerning the legality both of the interceptions and of their use in evidence. Additionally, we argue that the conversations utilized by the prosecution were, in any event, inadmissible due to: 1) destruction of the majority of the wiretap product by the Canadian Police; 2) censorship by the Canadian Police as to what remaining portions of the wiretaps and logs would be turned over to the prosecution; and 3) dilatory tactics employed by the prosecution with regard to disclosure of the available electronic surveillance materials.

For these reasons, it is important that we set forth a chronological sequence of events commencing with the filing of the indictment.

1. The Pre-trial Proceedings

The events of this case took place in December, 1970 and January, 1971. The indictment was not filed until October 9, 1973 (A. 1). The defendants Dasti and Oddo were produced in court for arraignment on November 9 and 27, 1973, respectively (A. 2). On December 10, Judge Mishler directed that trial was to begin on March 18, 1974, and on December 24, 1973 the government filed a notice of readiness for trial (A. 2).

Since the defendant Cotroni was a resident of Canada, it was necessary for the government to commence extradition proceedings against him. On the originally scheduled trial date of March 18, 1974, the trial was adjourned pending Cotroni's expected extradition from Canada (A. 3).

In early June, 1974, the attorneys for Dasti and Oddo requested in writing that the government provide them with discovery concerning electronic surveillance, including logs, transcripts, etc., and the government apparently agreed to do so (A. 12-14).

On June 21, 1974, Judge Mishler directed that the trial was to commence on November 18, 1974 (A. 3). On October 23, 1974, following his extradition, the defendant Cotroni was produced for arraignment in the District Court, and had not yet retained an attorney (A. 291). His bail was set in the amount of $1,500,000 (One Million Five Hundred Thousand Dollars) (A. 297), and he has remained in custody ever since due to his inability to post such extraordinary bail. By October 31, 1974, Cotroni had retained counsel, and the District Court refused to

adjourn the scheduled trial date of November 18, noting, in response to counsel's claims with regard to the amount of preparation that had to be done: "Anything that can be done in eighteen days can be done in a year if you try hard enough . . ." (A. 325).

Significantly, as of the date of Cotroni's arraignment, the government had still not provided any of the defendants with discovery concerning electronic surveillance, and on October 17, 1974, counsel for Dasti and Oddo found it necessary to renew their requests, again in writing (A. 12-14).

Moreover, on October 30, 1974, Cotroni's counsel orally requested particulars concerning the known and unknown conspirators alleged in the indictment. This information was never forthcoming until the actual trial began, January 6, 1975, and then in a fashion apparently calculated by the government to create an ambush for the defendants (see Points II and III, *infra*).

It was not until November 1, 1974, that the government commenced slowly feeding a small amount of factual electronic surveillance materials to the defense, amidst a deluge of other material. The government provided the defense with a copy of a tape recording of various intercepted conversations which it intended to put in evidence at the trial.* Many of the conversations on the tape

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* The tape recording was accompanied by a volume of twenty-five miscellaneous documents, amounting to hundreds of pages, unrelated to electronic surveillance and chiefly consisting of prior statements of government witnesses. The table of contents of that volume is reproduced at A. 219. As noted hereinafter, three additional such volumes were thereafter provided to the defense over the course of the ensuing month. The tables of contents of those volumes are reproduced at A. 220-2. Copies of the actual volumes have been docketed with this Court as part of the record on appeal.

recording were in French, and no transcript in French or English was provided to the defense at this time.

On November 8, 1974, the government provided the defense with items of discovery numbered 28 through 42, including transcripts of only five (5) of the conversations. The government's letter of transmittal noted that the Court had scheduled a hearing with regard to the wiretaps for November 11, 1974, just three days later (A. 16). On that date, after much debate with regard to the necessity for a hearing and for additional disclosure, the Court adjourned the matter to November 14, 1974 (A. 350-418).

On November 14, 1974, the hearing commenced with regard to the legality and admissibility of the wiretapped conversations (A. 419-494). At the end of that day of testimony, the hearing was adjourned to November 29, 1974. In the interim, on November 20, 1974, the government provided the defense with items of discovery numbered 43 through 64, including seventeen (17) additional transcripts of conversations and edited versions of *French* summaries with regard to five (5) of the taps for the period December, 1970 and January, 1971 (A. 18). On November 27, 1974, and, not receiving any reply, again on December 5, 1974, counsel for Cotroni sent written requests to the government for discovery of all of the tapes, transcripts, summaries, recording equipment, etc., in connection with the wiretapping operation. The hearing was resumed on November 29, 1974, without any response to these requests by the government (A. 495).

On December 9, 1974, the government provided the defense with edited logs for nine (9) of the Vegas taps. According to the government's letter of transmittal (A. 24), "pertinent" log entries had been translated from French into English; "not relevant" summaries were not translated; and "irrelevant conversations which the Canadian government does not wish to make public at this

time have been omitted from the discovery material and will be provided to the Court for *in camera* inspection."

On December 10, 1974, counsel for Cotroni found it necessary to call upon the Court for assistance in securing an answer from the government with respect to the discovery requests of November 27 and December 5 (A. 26). Still, no response was evoked from the government until, by letter dated December 23, 1974 (A. 149), government counsel replied, ". . . there are no original tapes available from which copies can be made.", and that "tape recordings of conversations which are not pertinent to the above captioned case have not been supplied to us by the Canadian government; therefore they cannot be made available to you. The Canadian government, however, has offered to allow Judge Mishler to listen to all the tapes in all the Vegas projects at the office of the Quebec Police Force in Montreal, Canada." and ". . . that it is impossible to produce for examination the automatic machines [and other interception equipment] used in connection with the Vegas projects." Additionally, government counsel stated that "with the exception of certain logs of conversations which will be delivered to the Court for *in camera* inspection at the request of the Canadian government, all logs and transcripts which have been supplied to the United States Government have already been made available to defense counsel." On the same date, the government extended to Judge Mishler the invitation of the Quebec Police Force to travel to Canada "to examine the logs and transcripts and listen to the tape recordings which are not being turned over at the office of the Quebec Police Force in Montreal." (A. 147-8).*

The hearings were continued on December 27, 1974 (A. 722), December 30, 1974 (A. 1004), December 31, 1974 (A. 1204), January 2, 1975 (A. 1381), and termin-

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* Judge Mishler categorically refused to travel to Montreal to determine the relevance of the materials in question (A. 2034-6).

ated on January 6, 1975 (A. 1543), with a determination by Judge Mishler that the wiretapping was legal and that the product of that wiretapping was admissible in a federal criminal trial (A. 1543-1622). Judge Mishler also filed an opinion in support of his conclusions (A. 192-211).

2. The Destruction and Censorship Policies of the Canadian Police.

The evidence at trial revealed that all conversations passing over the wiretapped telephones were recorded without reference to their content (A. 566, 673). The original recordings were thereafter monitored and, based upon the subjective impressions of the monitoring agent, *who searched only for inculpatory conversations* (A. 1812), duplicate copies were made of "very important" conversations; summaries, with interpolation of the agents' suspicions, were made of "important" (incriminating) conversations, and no record was made of "unimportant" conversations (A. 1152-3). The original tapes were then destroyed (A. 530-1, 862, 1151, 1304, 1343, 2000).

Thus, a summary of the electronic surveillance shows most of the conversations intercepted were not available in any form; many of those still in existence (only inculpating ones) were available in the form of editorialized summaries. And, of those available, the Canadian police selected the ones to be made available (pertinent or most damaging?). Thus, most of the conversations were not available to the prosecution or the defense, and many of the conversations were only available in the form of editorialized summaries. Additionally, as noted, *supra*, the Canadian Police exercised their judgment in determining what was to be made available to the defense.

C. The Prosecution's Case.

1. Guiseppe Catania.

Catania was the government's chief and indispensible witness. Without his testimony there could have been no prosecution in this case, and without his testimony weaving a fabric of detail around the wiretapped telephone calls, there could not have been any conviction. The conversations were equivocal and practically undecipherable.

Catania emigrated to South America from Italy in 1950. Thereafter, he engaged in the textile, shirt and suit business, eventually settling in Mexico in 1959 (Tr. 43-5). At trial, he claimed that he first became involved in the wholesale distribution of narcotics in 1969 with an individual by the name of 'Bala'. He admits to having engaged thereafter in the importation of hundreds of kilos of pure heroin (Tr. 46, 140-161).

The circumstances under which Catania came to become a witness in this case amply demonstrate the gravely suspect nature of his testimony. On December 6, 1972, the Mexican authorities, in connection with a tax evasion charge concerning the smuggling of diamonds, arrested him. By making payments to the appropriate authorities, his subsequent eight and one-half month incarcerration was spent under luxury circumstances with conjugal visits and servants (Tr. 47, 165-6). In August, 1973, he was ostensibly deported to Italy by the Mexican authorities; however, his plane stopped at Houston, Texas where he was arrested by agents of the DEA, and informed that he had been indicted in the Eastern District of New York with regard to a transaction involving fifty (50) kilos of heroin (Tr. 48, 193). In September, 1973, realizing that the pending charge against him, as well as other potential narcotics charges, would subject him to the possibility of life imprisonment,

Catania agreed to cooperate with the government against the defendants herein in return for the promise that he would be permitted to plead to a tax count. (Tr. 49, 194-230). The plea was entered in September, 1974 (Tr. 222).*

Catania first met the defendant Cotroni in 1966 in Canada. Their relationship was strictly legitimate, business and social. Cotroni had absolutely no knowledge of Catania's involvement in narcotics, nor did Catania have any reason to believe that Cotroni had any involvement in narcotics. Purely as a favor, and without any illicit connection, Catania rented a house in Acapulco for Cotroni during the winter season of 1969-1970. He did so again for the winter season of 1970-1971 (Tr. 47, 115, 122-138, 155, 246, 378, 538, 568).

2. October 6, 1970—Altamura Visits Montreal.

On October 6, 1970, three months prior to the conspiracy herein, DEA Agent in Canada, Kevin Gallagher and Canadian police officers Sauve, Beers, and Lagimodiere conducted a surveillance in Montreal during which they observed Vincent Altamura meeting at a restaurant with Dasti, Anthony Vanacore, and Paul Oddo. Nothing was learned as to the subject matter of their discussion (A. 2100-2110).**

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* As of the time of the instant trial (January, 1975), Catania had not been sentenced. Despite his admitted involvement in the importation into the United States of huge amounts of heroin, he was subsequently given a suspended sentence and placed on unsupervised probation.

** The testimony with regard to the fact of this meeting was received in evidence over a defense objection that it fell outside the time period of the instant conspiracy as alleged by the indictment (December, 1970-April 30, 1971), and upon the further grounds that the government had given no notice of its intention to adduce such evidence and that no connection was made between this meeting and the instant conspiracy (A. 2100, 2108, 2109).

3. December, 1970—The Alleged Offer and Acceptance.

As noted, *supra*, Catania was living in Mexico City in December, 1970. On December 19, 1970, DEA Agent Sedillo observed the defendant Cotroni and two of his young children deplaning in Mexico City while enroute to their rented house in Acapulco. Cotroni was driven to his hotel in a car registered to Catania (Tr. 1665-9).

According to Catania, in December, 1970, he had been approached by Bala who inquired if Catania might be able to find a customer for ten (10) to twelve (12) kilos of cocaine. Catania allegedly mentioned this to Cotroni, and Cotroni said he would try to contact a friend who might be interested (Tr. 51-9).

Two or three days later, Cotroni allegedly said that he had a friend who would be interested. Catania responded that the quantity available would be nine (9) kilos and the price would be $11,000 (eleven thousand dollars) per kilo. Cotroni said he would convey this information to his friend and that he would report back to Catania as to whether the friend wished to make the purchase (Tr. 59-60).

There is no evidence whatever in this record that, during his stay in Mexico (December 18-December 31) (Tr. 1829) Cotroni had any meeting nor made any telephone calls concerning this subject. Moreover, with eleven (11) telephone taps active twenty-four hours a day, no calls whatever were received in Canada from Cotroni.*

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* During the thirty-two (32) hour period *ending* at 8:00 P.M. of December 31, 1970, the Canadian authorities intercepted two telephone conversations between Dasti and Oddo. On both occasions, Oddo in New York was calling Dasti in Montreal. It was the government's claim that, by means of code, the two men were discussing a contemplated narcotics transaction (conversations Nos. 1 and 2; A. 1756, 1763).

In most cases the transcripts of telephone conversations have been played or read into evidence and the text has been repro-

[Footnote continued on following page]

Before Cotroni left Mexico City on December 31, 1971, to attend a brother-in-law's funeral, he allegedly told Catania to notify him in Montreal as to when the cocaine would be ready for delivery. It was agreed that the delivery would be in New York (Tr. 61).

4. January 1-9, 1971—the Alleged Preparation for the Transfer.

At some point in early January, Bala had a meeting with Catania and Martinez, who was scheduled to transport the cocaine to the United States. Catania knew Martinez from prior heroin transactions. It was agreed that Martinez would bring the cocaine to a motel in Dallas. Upon arriving at the motel, Martinez would notify Bala who would, in turn, notify Catania. Catania was then to go to the motel and join Martinez (Tr. 62-3).

Airline records show that Cotroni departed Montreal to return to Mexico City at 5:00 P.M. on January 1, 1971 (A. 2422-3).*

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duced in the record by the court reporter. In those situations where no recording was available, a summary of the conversation was given to the jury by a Canadian officer. These summaries were based upon wiretap logs which, admittedly, contained the subjective interpretations of the eavesdroppers. In view of the controversy as to the meanings of the recorded conversations and as to the accuracy and objectivity of the summaries, we shall not endeavor to summarize or interpret the meanings of those conversations but will only note their respective admission into evidence in this Statement of Facts. Under Points II and III, *infra*, we argue the inherent unfairness of these selective recordings and of the subjective summaries.

* On January 1, 1971, between the hours of 8:00 A.M. and 4:00 P.M., the Canadian authorities intercepted a telephone conversation (No. 3; A. 1766) between Oddo, in New York, and Dasti, in Montreal.

On January 2, 1971, the authorities intercepted a telephone conversatoin between Oddo and Vanacore, in New York, and Dasti, in Montreal (No. 5; A. 1781).

Again, it is claimed that these conversations were in code and involved a prospective narcotics transaction.

On January 4, 1971, George Stewart allegedly met with Cordovano and Altamura at Pagano's Restaurant in New York City. According to Stewart, Altamura said he might have "something" from or through some unnamed place in Canada in the near future (A. 2245-8).*

On January 6, 1971 DEA Agent Gallagher and Canadian police officers Beers and Sauve observed Dasti meet with Oddo and Vanacore in the vicinity of the Laurentian Hotel in Montreal. Later that evening, Dasti drove the other two men to the airport (A. 1879-83).

On January 7, 1971, Catania travelled from Mexico City to Montreal and registered at a motel (Tr. 65).

On January 8, 1971, according to Catania, he met with Cotroni and Dasti at a Montreal restaurant, and it was allegedly agreed that the cocaine transfer would take place at a restaurant in New York City on the following Sunday evening (Tr. 67-8).** On this same day, Stewart had another conversation with Cordovano who told him that Altamura had said that a shipment of twenty-four kilos of cocaine was coming into town

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* On January 4, 1971, the authorities intercepted a telephone conversation between Oddo and Vanacore, in New York, and Dasti, in Montreal (No. 6; A. 1786).

On January 5, 1971, the Canadian authorities intercepted two conversations from Oddo and Vanacore, in New York to Dasti, in Montreal (No. 7; A. 1791).

** DEA Agent Gallagher and Canadian Police Officer Sauve observed the meeting, but heard none of the conversation. Gallagher contacted the New York officers of the DEA, advised them that Dasti would be coming to New York and requested a twenty-four hour surveillance of him. He requested no such surveillance with regard to the witness Catania. These instructions were apparently based upon a telephone conversation intercepted by the Canadian authorities on this day in which Dasti advised his wife that they would be going to New York for four or five days (A. 1889-91, 2078-80).

and that he and Bynum were going to buy a quantity of it. Cordovano allegedly indicated that Altamura expected that twenty-four kilos of heroin would be coming within two weeks (A. 2249-50).*

On January 9, 1971, Catania left Montreal to go to Dallas. The hotel records reveal that he checked out of the Holiday Inn on this date (Tr. 1094, 400-1). On this same day, Mr. and Mrs. Dasti checked into a New York hotel. A DEA surveillance of Dasti at the New York hotel revealed that Dasti met with Vanacore for about twenty (20) minutes (A. 1920-2).

5. January 10, 1971—The Alleged Transfer.

Catania allegedly met Martinez at the motel in Dallas, and Martinez showed him a bag which allegedly contained the cocaine. Catania had never seen cocaine before and noted that it had brown spots. Catania and Martinez then took a plane to New York and stayed at the Taft Hotel (only Catania was registered).** According to Catania, he and Martinez then met Dasti outside the Hotel, and Dasti said that within fifteen (15) or twenty (20) minutes a person would arrive to whom the cocaine should be delivered. After the passage of fifteen or twenty minutes, Catania saw Dasti walk to the telephone area in the lobby of the Hotel and meet with a person whom Catania has since come to understand is Paul Oddo. Thereafter, Dasti returned, alone, and told Catania to go to the Riverside Plaza Hotel. Dasti arrived at that Hotel separately, met Catania, and told him to go to a particular room in the Hotel. Catania did so, Oddo opened the door of the room and accepted the narcotics. Catania then went down to the lobby of the

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* The Canadian authorities intercepted a conversation on January 8, 1971 between Dasti and his wife, both in Canada (No. 9; A. 1904).

** It was stipulated that Catania registered at the Taft Hotel. There is no indication that Martinez was present.

Hotel, and met Dasti, who told him that the arrangements for payment would be made on the following day (Tr. 72-81).

The 24-hour DEA surveillance of Dasti on January 10, 1971, failed to reveal any meeting with Catania, Martinez or Oddo (Tr. 841-60).*

According to the government witness Stewart, he received a call from Cordovano on this day between 5:00 and 6:00 P.M., and was told to bring a packaging machine to Bynum's home. While Stewart waited at Bynum's home, Cordovano telephoned and said that he was on his way there. At about 1:00 A.M. on January 11, Cordovano arrived with five (5) kilos of cocaine. Stewart recalled that some of the cocaine was brown and sticky and some of it was in either powder or crystal rock form. At that time, Cordovano said that Altamura had another four (4) kilos of cocaine to dispose of. Cordovano also allegedly claimed that Altamura had told him that the cocaine had arrived on January 10 (A. 1166-1181).

6. January 11-12, 1971—The Alleged Payment Problem.

According to Catania, Dasti called him on the morning of January 11, 1971, and said that he was on his way to see Catania. When they met that morning, Dasti told Catania to go back to the place where he had delivered the cocaine and payment would be made to him.

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* On January 10, 1971, the Canadian authorities intercepted a telephone conversation between one Horvath and Cotroni, both in Canada (No. 18; A. 1999). During the period from 8:00 P.M. of this day until 8:00 P.M. of January 11, 1971, they intercepted a call from Dasti, in New York, to Cotroni's maid in Canada, as well as a call from Cotroni to his maid, both in Canada (Nos. 19 and 20; A. 2005-6).

Catania did so; Oddo again appeared at the hotel room door, and gave Catania a shoe box containing American money. When Catania later counted the money, it came to $43,000.00 (forty-three thousand dollars). Later that day, Catania allegedly met with Dasti who explained that full payment had been delayed due to the presence of brown spots on the cocaine, but that the balance would be paid within two or three days. Catania said he was returning to Mexico City and that the balance should be brought to him there (Tr. 83-9).*

On January 12, 1971, Catania left for Mexico City. Upon arriving at his place of business there, Bala was waiting for him, and he gave Bala the money he had collected thus far and told him not to worry about the balance (Tr. 89-90). A surveillance of Dasti in New York on this day failed to disclose anything of note (A. 1956).**

On January 13, 1971, Dasti and his wife checked out of the New York hotel (A. 1911).***

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* Peculiarly, on the morning of January 11, 1971, when according to Catania, Dasti was allegedly meeting with him to discuss the transaction in midtown Manhattan, Dasti was, in fact, under surveillance and was observed to travel to a currency exchange and then to the Bronx where he was observed meeting with Vanacore and Oddo. The government was unable to reconcile this contradiction in the testimony.

** Sometime between 8:00 A.M. and 8:00 P.M. of January 12, 1971, the Canadian authorities intercepted a telephone conversation between Dasti, in New York, and Cotroni, in Canada (No. 10; A. 2009).

*** The Canadian authorities intercepted several telephone conversations on January 13, 1971. The first was between Dasti and his wife (No. 11; A. 2015), the next was between Cotroni and Dasti (No. 22; A. 2016), and the last was between Dasti and his wife (No. 23; A. 2017).

On January 14, 1971, Vincent Altamura checked into the Laurentian Hotel in Montreal at 9:30 A.M. (A. 2424). On the same day, Cotroni departed Montreal for Mexico at 3:35 P.M. (A. 2422-3).

On January 1[illegible] 1971, according to Catania, Cotroni went to Catania' place of business in Mexic[illegible] City and gave him $7,000.00 (seven thousand dollars), remarking that the brown spots on the cocaine were causing the delay. Catania delivered the $7,000.00 to Bala, telling him to wait a few days for the rest of the money (Tr. 90-94).*

Altamura checked out of the Laurentian Hotel in Montreal at 9:27 A.M. on January 18, 1971 (A. 2424).**

On January 22, 1971, DEA Agent Gallagher participated in a surveillance in Montreal where Dasti was

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* On the same day, the Canadian authorities intercepted a call from Dasti, in Canada, to Cotroni, in Mexico (No. 12; A. 2019), and a call from Oddo, in New York, to Dasti, in Canada (No. 13; A. 2025).

On or about January 16, 1971, the Canadians intercepted three telephone conversations between Oddo, in New York, and Dasti, in Canada (Nos. 14, 15, and 25; A. 2025, 2026, 2053). They also intercepted a call between Dasti and his wife (No. 24; A. 2052) and between Dasti, in Canada, and Cotroni, in Mexico (No. 16; A. 2024).

** On or about January 19-20, 1971, the Canadian authorities intercepted several conversations: Orsini and Dasti, both in Canada (No. 26; A. 2054), Dasti, in Canada, to Cotroni, in Mexico (No. 17; A. 2055), Cotroni, in Mexico to Carlino, in Canada (No. 28; A. 2062), Carlino, in Canada to Dasti, in Canada (No. 28; A. 2062), Orsini, in Canada to Cotroni, in Mexico (No. 30; A. 2063), Dasti, in Canada to Orsini, in Canada (No. 30; A. 2065), and Cotroni, in Mexico to Orsini, in Canada (No. 31; A. 2066).

observed to meet with Orsini, and then go to the Bank of Nova Scotia, and then return to give Orsini a package (A. 2068-76, 2094-98).*

According to Catania, at or about this time, Cotroni returned to Mexico City from Acapulco and Orsini arrived in Mexico City. At this time, Cotroni allegedly delivered an additional $14,000.00 (fourteen thousand dollars) to Catania with respect to the payment due on the cocaine. During a conversation with Cotroni and Orsini at this time, one of them inquired as to whether Catania might be able to obtain some heroin from Europe. He responded that he could do so, but he would not until the balance of the money due was paid to him (Tr. 95-6).

On March 17, 1971, Dasti was arrested by Canadian authorities in connection with alleged illegal gambling (A. 2370-1).

Subsequent efforts on the part of Catania to secure further payment were unsuccessful except to the extent that he allegedly received an additional $500.00 (five hundred dollars) from Cotroni in May, 1972 (Tr. 103). In December, 1972, he was arrested in Mexico City, as noted *supra*, p. 13.

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* Between 8:00 P.M. of January 21 and 8:00 P.M. of January 22, the Canadian authorities intercepted a conversation between Dasti and Horvath, both in Canada, in which Dasti is alleged to have said that he gave money to Orsini to give to Cotroni, but kept $1300.00 (thirteen hundred dollars) (No. 32; A. 2118).

ARGUMENT

POINT I

The Electronic Surveillance Herein Clearly Violated Both American And Canadian Law, And Its Product Should Have Been Excluded From Evidence.

A. The Wiretapping in this Case Intercepted Telephone Conversations Which Utilized the United States Communication Network. For that Reason, the Legitimacy and Admissibility of the Product of Those Interceptions Must Be Measured by the Requirements of 18 U.S.C. § 2510, et seq. Since the Interceptions did not Comply With the Requirements of Those Statutes, They, and their Investigative Fruits, Should Have Been Excluded From Evidence.

Even the restricted number of intercepted conversations supplied by the prosecution in the instant case show clearly that the majority number of those conversations utilized the United States communication network.

We have provided the Court with a chart of the various conversations which were *directly* used in evidence (Table "B", *infra*, p. 2a). Thirteen (13) of those conversations were between New York and Canada; six (6) were between Canada and Mexico. As the trial evidence revealed, telephone communication between New York and Canada as well as Canada and Mexico utilize the United States communications network (A. 1347-8).

In *United States* v. *Toscanino*, 500 F.2d 267, 279, this Court held, *inter alia*:

> "* * * We agree with the government that the federal statute governing wiretapping and eavesdropping, 18 U.S.C. § 2510, *et seq.*, has no application outside of the United States. The term

> 'wire communication,' as used in the statute, 18 U.S.C. § 2510(1) is intended to refer to communications 'through *our Nation's* communication network.' *See*: 1968 U.S. Code Cong. & Admin. News, 90 Cong. 2d Sess. p. 2178 (emphasis added)."

Reference to the terms of the statute, itself, makes clear that any interference with an international communication utilizing our telecommunication network is subject to the terms of 18 U.S.C. § 2510, *et seq.* Thus, § 2510 sets forth, *inter alia*, the following definition:

> "(1) 'wire communication' means any communication made in whole *or in part* through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate *or foreign communications;**
>
> * * * * *
>
> "(8) 'contents', when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;
>
> * * * * *
>
> "(11) 'aggrieved person' means a person who was a party to any intercepted or oral communi-

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* Although, in his opinion on the question of the legality and admissibility of these wiretaps, Judge Mishler characterized this issue as presenting "a difficult question", he went on to give that question only a superficial treatment. Thus, in quoting the language of subd. (1), he omitted the reference to foreign communications (A. 204), and noted only "that the communications which are protected are the interstate communications" (A. 205).

cation or a person against whom the interception was directed."

The very language of the statute makes obvious the Congressional awareness that the United States communication network is inextricably woven into conversations which are international in nature as well as domestic. And also obvious from the wording of the statute is that the Congressional intent was to regulate the interception and subsequent evidentiary quality of any and all calls utilizing the United States telecommunications.*

Section 2511(a) makes it a crime to intercept any wire communication, and § 2511(c) makes it a crime to disclose any such interception communication.

Section 2515 is a statutory exclusionary rule applicable to intercepted communications:

> "Section 2515. Prohibition of use as evidence of intercepted wire or oral communications.
>
> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

It would be pointless to catalog the numerous violations of 18 U.S.C. § 2510 which were involved in the

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* The statute which preceded § 2510 *et seq.*, to wit, former § 605 of the Federal Communications Act (47 U.S.C. § 605), provided similarly against the interception and divulgence of *foreign* as well as domestic communications.

interception and disclosure of the telephone conversations in the present case. The program of wiretapping in this case was violative of and disregarded every rational safeguard written into the statute to protect the privacy of telephone conversations.

Our contentions in this regard are buttressed by several factors. The "silver platter" doctrine, repudiated in *Elkins* v. *United States*, 364 U.S. 206 (1960) condemned use by the Federal Courts of evidence obtained in a manner illegal under Federal standards. Is not in play in the instant case the "Silver Platter" doctrine on an international level; is the condemned evidence herein any less contemptible? Any holding to the contrary would create a great likelihood of injustice. International telephone communications, particularly between the United States and Canada, number in the millions each year. If such communications could be intercepted by the law enforcement authorities of each country and turned over to the law enforcement authorities of the other country, without fear that either country's regulatory statutes would apply, then there would be absolutely no regulation of international wiretaps. Moreover, precisely as was the case here, our courts would have no power to command the production of any of the fruits of wire taps conducted in a foreign country.

A further basis for application of the exclusionary rule to the wiretaps in this case is the complicity of federal law enforcement officers in the Canadian investigation. DEA Agent Gallagher was accepted as and acted as a part of the Canadian investigative team. He was given daily review of the wiretap product, participated in visual surveillances, etc.

We respectfully submit, therefore, that by the terms of 18 U.S.C. § 2510 *et seq.*, as well as by the participation of American agents in the Canadian wiretap program and the impotency of American courts to compel disclosure of the product, the wiretap evidence in this case should have been suppressed.

B. The Electronic Surveillance Herein Was Unlawful And Illegal Under The Canadian Law Which Existed Prior To June 30, 1974.

Even if Title III were not applicable to the wiretaps in this case, the instant electronic surveillance was also unlawful under Canadian law existing at the time of the interception herein, and, therefore, inadmissible in the courts of the United States.

The testimony reveals two separate methods by which tapping of the telephone lines herein was accomplished:

(i) One method was by tapping directly into the "target" telephone line, in effect, creating an extension to the phone being tapped. This was accomplished on two telephones.* Each of these taps lasted approximately one year. This direct method involved having someone climb a telephone pole which supported the junction box in which were contained the end terminals of the target phones. He would thereafter cut through the insulation of the end terminals of many other telephones contained in the junction box until the target phones were discovered. In cutting through the insulation of many other telephones in the junction box, in an attempt to

* On one occasion, the police directly tapped a single telephone line in the Laurentian Hotel for fifteen (15) minutes. The method was similar to Method #1 above.

locate the phones to be tapped, permanent damage resulted in each and every wire tested. This damage was not repaired and was left as a permanent condition which would cause the copper wire to oxidize so that within five years the wire would be rendered useless to carry messages (A. 694, 712, 1362).

(ii) The other method of tapping was accomplished by renting an apartment and a telephone (in some instances the apartment of a cooperating citizen was utilized) in the immediate vicinity of the target phone. Then when the target phone was located by means of cutting and permanently damaging other adjoining telephone lines, as outlined above, both the target phone and that phone rented by the police would be joined by the placement of an induction coil (equipment improvised by the police in question, not Telephone Company equipment) in the terminal box, then bridging the suspect phone to the police rented telephone by additional wires. The police, using their rented phones would open the line they rented and attach the open line to an automatic tape recording device at police headquarters many miles away. Thus, the telephone line rented by the police, under the subterfuge of ordinary subscriber service was kept open on a twenty four hour basis, in some cases for more than a year. Each and every time a phone call was placed to or from the target phone, the sounds would be recorded at police headquarters (A. 539-545, 549-554, 652-7, 708-9, 1355-1362, 1377, 1534-1536).

A telephone engineer testified that when Method #1 was used, the tap substantially diminished the service to

the subscriber whose line was tapped by creating a loss of function of the phone. And when Method #2 was used, the many telephone wires left open on a twenty-four hour basis at police headquarters caused telephone service across the entire city of Montreal to be adversely affected since the use-probabilities engineered into the Montreal telephone system, both in the central office near the police headquarters and in the central office near the suspect phone, as well as in the central offices in between, were substantially diminished (A. 1346-1379).

All of the wiretapping herein, by either method, was carried on without the knowledge or consent of the Telephone Company. Indeed, a subterfuge was used by way of rental of ordinary telephone service, inasmuch as the Telephone Company would never have consented to permit either the tapping of subscriber's phones or the open twenty-four hour service of any line without being properly compensated therefor. The telephone Company has a separate and more expensive rate for dedicated (open twenty-four hour) telephone service, which it was not paid herein, despite the fact that the telephone lines were open twenty-four hours a day; in some cases for more than a year. There is no time factor in the billing system of the Telephone Company in Montreal for "plain ordinary" subscriber service (A. 1530-1540).

An Act of Parliament in force at the time of the wiretapping herein was Section 25 of *An Act To Incorporate The Bell Telephone Company of Canada*, Statutes of Canada, 1880, Chapter 67 (hereinafter, "The Federal Telephone Act"), which, although the Act has been amended many times in other respects, reads as follows:

> "Section 25—Any person who shall willfully or maliciously injure, molest, or destroy any of the lines, posts or other material or property of

> the Company, or in any way willfully obstruct or interfere with the working of the said telephone lines, or intercept any message transmitted thereon, shall be guilty of a misdemeanor."

Both of the wiretapping methods utilized herein constituted a breach of § 25 of the Federal Telephone Act.

In the case of Method #1, the persons carrying out the wiretapping "willfully injured or molested the lines or other material of the Company". In the case of Method #2, the persons carrying out the wiretapping "willfully interfer[ed] with the working of the sail telephone lines".

Moreover, both methods constituted a blatant breach of § 25 of the Federal Telephone Act because the wiretappers "willfuily" "Intercept[ed]" "message[s] transmitted" on the "lines" "of the Company".

Moreover, the electronic surveillance conducted by the police in the instant case was unlawful for another, distinct, and independent reason: Section 24 of the Quebec Statute, the *Telephone Companies Act*, R.S.Q. (1964) Chapter 286 (hereinafter, "Quebec Telephone Act"). This statute reads, in relevant part:

> "Section 24—Every person who listens to or acquires knowledge of any conversation or message passing over the lines of a telephone system, not addressed to or intended for such person, and divulges the same or the purport or substance thereof, except when lawfully authorized or directed so to do, shall be liable to the same penalty and imprisonment as are enacted above" (A. —).*

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* It will be noted that § 4 is substantially the same as former 18 U.S.C. § 605, which was held by the Supreme Court to be an absolute ban against wiretapping by law enforcement officials, thus requiring the exclusion of such evidence in criminal trials, *Lee* v. *Florida*, 392 U.S. 378 (1967).

Section 4 of the Quebec Telephone Act is substantially the same as § 112 of the Ontario Statute, *The Telephone Act*, R.S.O. (1970), c. 457 (hereinafter, "Ontario Telephone Act"), which, in relevant portion, provides:

> "Section 112—Every person who, having acquired knowledge of any conversation or message passing over any telephone lines not addressed to or intended for such person, divulges the purport or substance of the conversation or message, except when lawfully authorized or directed so to do, is guilty of an offense and on summary conviction is liable to a fine or not more than $50.00 or to imprisonment for a term of not more than 30 days, or to both" (A. 263).

Significantly, § 112 of the Ontario Telephone Act was recently considered in a judgment of the Court of Appeal for Ontario in *Regina* v. *Chapman-Grange* (1973) O.R., Vol. 2, 290 (A. 83-100). Inasmuch as testimony by prosecution witnesses herein revealed that very few cases interpreting the Federal Telephone Act, the Quebec Telephone Act, or the Ontario Telephone Act have been forthcoming from the appeals courts of Canada,* the *Chapman* case, *supra*, is of the greatest significance in the instant case and affirms the proposition that the three statutes are a complete and total proscription against the interception and divulgence of Canadian telecommunications.

The District Court, in denying appellants' application to suppress wiretap evidence, referred to and apparently misinterpreted the *Chapman* case, *supra*, when the Court below held, *inter alia*:

> "[Appellants'] reliance on *egina* v. *Chapman-Grange*, *supra*, is misplaced. This Court is con-

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* The Canadian police have never submitted the fruits of their wiretaps to judicial scrutiny by offering the same in evidence.

> vinced that the finding of unlawful conduct in that case was based on the purpose and nature of the wiretap in question. In that case Chapman, a member of the police force, installed a wiretap on a labor union telephone at the direction of Grange, his employer, who was engaged in strike-breaking activities. The facts clearly demonstrate that Chapman was working for a private employer, and was not acting in his official capacity. The Court's statement that Cahpman was a plain clothes detective was irrelevant to the decision" (A. 202).

We disagree with the District Court's finding that the appellant in the *Chapman* case was employed by a private party and not acting in his official capacity. Indeed, the Court of Appeal for Ontario, in its statement of facts, relied upon the evidence that Chapman "at the relevant time was a constable with the Metropolitan Toronto Police Department, acting in a capacity as a plain clothes detective" (A. 91).

However, we do agree with the District Court that Chapman being a police official was irrelevant to the decision. The Court of Appeal for Toronto gave no significance to Chapman's role as a police official. Thus, that Court determined that the interception and divulgence of telecommunications is an absolutely condemned and unlawful act pursuant to the laws of Canada.

In the *Chapman* case, *supra*, the appellants stood charged with unlawful conspiracy to commit an act prohibited by § 112 of the Ontario Telephone Act. Chapman, as above indicated, was a police constable. The appellant Grange, in that case, was the president of Canadian Driver Pool Limited. That company carried on business in Toronto supplying trucks and drivers to

companies which were strike-bound. On August 27, 1971, it was found that the phone of a local union, then engaged in a strike, had been tapped by a wire connected directly to the telephone junction box on the outside of the union building, leading directly to a tape recorder hidden under a wooden crate. The appellant Chapman was "captured" at or near the area where the tape recorder had been found, holding a parcel which contained another tape recorder.

The Court of Appeal for Ontario held, in conclusion, *inter alia*:

> "My conclusion accordingly is that § 112 of the Telephone Act is valid legislation; an agreement to contravene it either in the sense of depriving persons entitled to its protection of the civil right which that section gives them, or to contravene the section merely by doing what is prohibited on terms of penalty, is an agreement to effect an unlawful purpose; and there was evidence to support a conviction against both appellants upon the indictment. I would therefore dismiss their appeal" (A. 99).

The various Telephone Acts of Canada, hereinabove referred to, are practically verbatim with the provisions of our former § 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605 (hereinafter, "§ 605"). That statute provided, in part:

> "[N]o person not being authorized by the sender shall intercept any communication and divulge *** the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person *** ".

Although the *Chapman* case, *supra*, has determined the validity of the various Canadian Telephone Acts, the Court there was not presented with and did not

dispose of the issue of whether or not the fruits of such unlawful acts of interception and divulgence of telecommunications would be accepted as valid and legal evidence in a court of law of Canada. Indeed, no cases have been forthcoming from the prosecution to support the position that the fruits of such violations are admissible in evidence in the Courts of Canada.

However, we need not go so far as the Canadian border for guidance as to how the courts of the United States view the fruits of such violations when faced with a prohibition against disclosure (i.e., a statutory exclusionary rule).

In *Lee* v. *Florida*, 392 U.S. 378, the Supreme Court of the United States considered the application of § 605 to the circumstances of a case much like the instant one. In *Lee*, the petitioner was issued a telephone on a four party line. A week later, at the direction of the Orlando (Florida) Police Department, the telephone company connected a telephone in a neighboring house to the same party line. The Police attached to this telephone an automatic articulator, a tape recorder, and a set of earphones. The Police in that case could hear and record all conversations on the party line without the necessity of lifting the receiver on their own telephone. At the petitioner's trial several of these recordings were introduced in evidence by the prosecution over objection of defense counsel. The Supreme Court held:

> "For here the police * * * deliberately arranged to have a telephone connection to [appellant's] line without his knowledge, and they altered that connection in such a way to permit continuous surreptitious surveillance and recording of all conversations on the line. * * * The conduct of the Orlando Police, deliberately planned and carried out, clearly amounted to interception of the peti-

tioner's communications within the meaning of § 605 of the Federal Communications Act. (392 U.S., at 381-2).

* * * * *

"* * * [I]n *Benanti* v. *United States*, 355 U.S. 96, 78 S.Ct. 6, 2 L.Ed. 2d 19, * * * the Court returned to the teaching of *Nardone* [*Nardone* v. *United States*, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314] in giving emphatic recognition to the language of the statute that itself makes illegal the divulgence of intercepted communications. In *Benanti*, the Court held inadmissible in a federal trial communications that had been intercepted by State officers. '§ 605', the Court said, 'contains an express absolute prohibition against the divulgence of intercepted communications' 355 U.S., at 102, 78 S.Ct. at 159" (329 U.S., at 384).

* * * * *

"But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity'. *Elkins* v. *nited States*, 364 U.S. 206, 222. Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the laws of the United States,' laws by which 'the Judges in every State [are] bound * * *.'

* * * * *

"We conclude as we concluded in *Elkins* and in *Mapp* that nothing short of mandatory exclusion of illegal evidence will compel respect for the federal law 'in the only effective available way—by removing the incentive to disregard it.' *Elkins* v. *United States*, 364 U.S. at 217, 80 S.Ct. at 1444" (392 U.S. 378 at 387).

If the United States Supreme Court has determined as it did in *Lee, supra*, that the imperative of judicial integrity required the mandatory exclusion of evidence obtained illegally, in contravention of § 605, an Act closely parallel to the Canadian Telephone Acts in question herein, can the courts of the United States determine that the Canadian courts have less judicial integrity and would have accepted in evidence the fruits of the illegal acts of their police—fruits of a direct violation of the three recited Telephone Acts of Canada?

Moreover, the courts of the United States cannot permit such evidence to be brought before a jury or support a conviction under American law.

C. The Electronic Surveillance Herein, Having Been Unlawful Under Canadian Law Prior To June 30, 1974, A Fortiori, Was Clearly Inadmissible Under Subsequent Canadian Statutes.

The Canadian Criminal Code was amended on June 30, 1974, with the passage of the Protection of Privacy Act (Sections 178.1 to 178.23) providing a proscription against willful interception of "private communications, including telecommunications," and providing criminal sanctions for the violation of those proscriptions.

The Protection of Privacy Act of Canada parallels our Title III (18 U.S.C. § 2510 *et seq.*) and contains a similar series of procedures providing for lawful electronic interception by way of court order and legislated regulations (A. 120-132). One such provision prohibits the admissibility of evidence, including telephone calls, obtained directly or indirectly by the interception of private communications unless:

> § 178.16(1) Canadian Criminal Code.
>
> "(a) the interception was lawfully made; or
>
> "(b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof" (A. 126).

Our similar statute, 18 U.S.C. § 2518(10)(a), permits the aggrieved person the right to suppress the contents of unlawfully intercepted telecommunications. There was not even an intimation herein that either the originator of the calls or the recipients of the calls consented to the admission of the intercepted conversations into evidence.

Equally without contradiction by the Crown or the United States Government, relying upon the Crown, is the proposition that telecommunications intercepted prior to June 30, 1974, unlawful at the time of interception, are totally and wholly inadmissible into evidence at trials which originate after July 1, 1974.

In January of 1975, when the instant trial commenced, the telecommunications herein, intercepted in the manner in which they had been intercepted by certain Canadian police officials prior to June 30, 1974 (i.e., 1970-71), were unlawful and would not have been permitted in evidence in a Canadian court of law.

Therefore, the instant interceptions would have been inadmissible pursuant to Title III whether or not they were actually intercepted in the United States (*See* Point I, subdiv. A, *supra*), and would have been inadmissible under Canadian law because of their unlawfulness, both prior to June 30, 1974 (*See* Point I, subdiv. B, *supra*), and subsequent to June 30, 1974 (Protection of Privacy Act, **A. 126**).

Under any view therefore, the interceptions herein were conducted in violation of law, without consent, and their admission into evidence in the instant prosecution, was totally improper and unfair.

POINT II

Since the Canadian Police destroyed much of the wiretapping product and refused to make available much of the remainder of that product, that which was made available should not have been received in evidence. This, combined with the trial court's refusal to review the available materials in Canada and the prosecution's dilatory pre-trial tactics, converted these proceedings into a trial by ambush and deprived the defendants of due process of law.

We have set forth the facts, *supra*, pp. 10-12 which reveal the manner in which the Canadian Police purposely destroyed all of the original wiretap evidence herein and refused, except for a miniscule portion of the copies of the recordings and summaries thereof, to permit the defense to have access to that evidence which still exists. The Canadian Police admit that there were thousands of phone calls originally intercepted (A. 566, 673, 1045); that, of these originals, they selected a few to be preserved by making copy tapes of the original recordings. The greater number of tapes were destroyed in their entirety, preserved only by subjective summary. The Canadian Police even refused to permit the District Court—*in camera* in the Eastern District—the opportunity to examine that evidence for the purpose of determining relevance. Rather, the Montreal Police insisted that the District Court travel to Montreal to study the wiretap material.

The District Court refused such offer and, thus, no objective determination has ever been made with regard to the accuracy and good faith of the arbitrary selectivity exercised by the Canadian Police.

Additionally, as set forth *supra*, at pp 8-9, although it claimed to be ready for trial on December 24, 1973, and although defense counsel as early as July, 1974 requested access to and information concerning the wiretap evidence, the government waited until practically the eve of trial

(November 1, 1974) before even permitting the defense any access to the electronic surveillance. And when it did so, the government literally bombarded the defense with thousands of pages of documents relating only to those select parts of the electronic surveillance chosen by the Montreal Police. As to the myriad of other calls—or even other wiretaps—there is no knowledge of the inculpatory relevant, or pertinent nature of such calls.

In *United States* v. *Kelly*, 420 F.2d 26 (1969), this Court decried government tactics smacking "of a trial by ambush", and, despite substantial evidence of guilt, reversed a conviction under circumstances less disturbing than those of the present case.

Everything about the use of the wiretap evidence in this case reveals a trial by ambush. The DEA agents in Canada as early as 1971, while the taps were actually in progress, were gathering evidence for the purpose of mounting a prosecution in the United States. They were working closely with the Canadian authorities, reviewing the actual wiretaps on a daily basis. Aware of the impending prosecution *vis a vis* the United States rules of evidence, they could easily have requested that the wiretap tapes be preserved. But they did not. The Canadian authorities admittedly never used tapes in court before and were conducting the wiretaps herein, not for evidence, but for information and investigation purposes. Their selectivity was not for preservation of evidentiary integrity nor was it even objective. The police official in charge of the actual tapes and of the composition of the summaries testified he selected that which was most favorable to inculpating the appellants only (A. 1152-3, 1812). The objectivity of their selectivity was manifestly lacking.

The intentional destruction or mutilation of relevant evidence gives rise to the inference that the matter destroyed or mutilated is unfavorable to the spoliator. *See*: Federal Rules of Evidence, Rules 1003, 1004; Prince, *Richardson on Evidence*, 9th Ed., § 91; *United States* v. *Alexander*, 326 F.2d 736 (4th Cir., 1964); *In Re Eno's*

Will, 196 App. Div. 131, 187 N.Y.S. 2d 756; IV Wigmore, *Evidence* § 1179 (3d Ed., 1940).

The reported cases with regard to spoliation of evidence involve, primarily, civil rather than criminal matters. We respectfully submit that in a case such as the present one, where the evidence has been destroyed, where it certainly would have been used by the prosecution if it had been favorable, and where no reasonable explanation has been established for failing to preserve it, a more stringent rule should come into play in a criminal case. If the non-disclosure of material evidence requires that a convicted defendant be granted a new trial, then must it not follow, *a fortiori*, that the destruction of such evidence should bar a conviction based upon that which was not destroyed, or upon self-serving summaries. Cf. *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Polisi*, 416 F.2d 572 (2d Cir., 1969); and *People* v. *Betts*, 272 App. Div. 737, 74 N.Y.S. 2d 791 (1st Dept., 1947).

In accord with our contention in this regard, is 18 U.S.C. § 2517 (8)(a) which requires, if possible, the recordation and preservation of all intercepted conversations in such a way "as will protect the recording from editing or other alterations" and prohibits the destruction of such recorded conversations within ten years.

It is respectfully submitted that whatever room there might otherwise have been (and we suggest there was none), to tolerate the Canadian censorship of evidence, it was either the obligation of the trial court to travel to Canada to review the materials which were retained there, or else to prohibit the use of any of the wiretap evidence. *See*: *Stewart* v. *Dameron*, 460 F.2d 278 (5th Cir., 1972); Cf. *Taglianetti* v. *United States*, 394 U.S. 316 (1969).

For all of the reasons hereinabove set forth, it is respectfully submitted that the use of the wiretap evidence in this case deprived the defendants of fundamental fairness and due process of law.

POINT III

The government's enlargement of the charges of the indictment to include the Bynum narcotic ring and the claim of a future intent to traffic in heroin deprived the defendants of a fair trial.

Despite requests by the defense as early as the first appearance of Cotroni's counsel (October 31, 1974), the government withheld its bill of particulars in this case until the first day of trial, January 6 (Tr. 118). That bill of particulars, for the first time, gave notice to the defense that individuals identified as George Stewart, Elvin Lee Bynum, Joseph Cordovano, Abraham Wright, and a number of others were charged as being co-conspirators. It gave no indication of the manner in which those individuals allegedly participated in the conspiracy (A. 286).

In the face of defense protestations, the following colloquy ensued between the Court and the prosecutor:

> "Mr. Puccio: This doesn't mean we are going to offer testimony on every one of these people. There are only two defendants on trial here. The defendants asked for people, known and unknown, and I gave them a list of people that we believe were members of the conspiracy.
>
> "I can make a representation that there won't be testimony concerning all those people.
>
> "The Court: Well I could see little reason to bring them in in a trial against these two defendants.
>
> "Mr. Puccio: I can see little reason also.
>
> "The Court: The government may feel that it is prudent to do it this way because in the event others are charged, the other lawyers also may pick up your bill of particulars and say: Oh, you never

said these people were members of the conspiracy and now you say they are." (Tr. 121-121a).

Toward the end of the government's case (A. 2122 *et seq.*), the prosecutor started providing the defense with 3500 material with regard to George Stewart. It soon became clear that the government intended to present a circumstantial case, predicated upon double hearsay for the purpose of establishing that the cocaine herein eventually came into the possession of the Bynum group. Over the strenuous objections of the defense (A. 2128-2146), Stewart was permitted to testify concerning several conversations with Cordovano who allegedly indicated that Altamura told him that his source of cocaine was Canadian, and that a shipment of cocaine had been received by him on January 10, 1971—the critical date in the present case (*supra*, pp. 18-19). Additionally, he testified that, on January 8, 1971, the following occurred:

> "Mr. Cordovano told me at that time that there would be a shipment of twenty-four kilos of cocaine of which he and Mr. Bynum were going to buy X amount, they didn't know how much at that time and the reason they were going to get the cocaine was to get an introduction to a new source of supply *for heroin* because at that time I was told there was supposed to be twenty-four kilos *of heroin* exactly two weeks following the delivery of the cocaine." (A. 2249) [emphasis added].

Following Stewart's references to the contemplated heroin transactions, a defense motion for a mistrial was denied (A. 2272).

It is significant that many of Stewart's facts do not fit the circumstances of this case. Thus, the anticipated shipment, as noted *supra*, was twenty-four (24) kilos of cocaine. The only other evidence in this case relates solely to nine (9) kilos of cocaine. Both Stewart and

Catania testified that the cocaine they saw had turned brown. From this fact, the government sought to establish an identity. However, on cross-examination, a government chemist conceded that the change of cocaine from white to brown is not in the least unusual (A. 2359). More significantly, of two samples which Stewart retrieved for the government from the batch of cocaine delivered by Cordovano, one of those samples was pure white—the sample which had *not* subsequently been "cut" by Bynum (A. 2357-9). Moreover, the chemist indicated that he would have anticipated that all the substance of the same contraband would be the same—pure white, granular, not brown and spotty.

The defense was rendered absolutely helpless by this testimony. The only persons who could refute it were Cordovano and Altamura, both of whom were in the process of appealing their own convictions. Indeed, the government was unable to locate Altamura despite long known awareness of his background, lawyers, etc. Cordovano absolutely refused to testify.* If the prosecution had not adhered to its policy of trial by ambush, *supra*, p. 39, there might have been some possibility of the defense acquiring evidence to attempt to refute the inferences sought to be drawn from Stewart's testimony. Despite the prosecutor's disclaimer, there can be no doubt that the government knew long in advance of this trial of the alleged connection between the instant conspiracy and the activity of the Bynum group. No excuse exists for the withholding of this information from the defense.

In *United States* v. *Sperling*, 506 F.2d 1323, 1340-1 (2d Cir., 1974), this Court said:

> "In view of the frequency with which the single conspiracy versus multiple conspiracies claim is

* It is worthy of note that when the government desires the testimony of a witness, it is empowered to confer immunity upon him; no such co-extensive immunity powers were available to the defense.

> being raised on appeals before this court * * * we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. * * * . . . [M]any serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself."

The situation presented in this case is even more serious than that presented in *Sperling*. At least there, multiple defendants were on trial. Here, assuming *arguendo* that Altamura was a link between two conspiracies, he was not even on trial nor were the people involved in the other conspiracy with which he was associated.

The government introduced the Bynum conspiracy evidence in this trial for the sheer dramatic impact of showing that someone besides Catania saw some cocaine in New York on January 10, 1971, and for the further revulsion that might be generated in the jury by the allusion to a future shipment of twenty-four kilos of heroin.

When it is considered that the evidentiary link between the Bynum cocaine and these defendants is tenuous in the extreme, and that the source of that evidentiary link is double hearsay ultimately reported by an informant dependant on the government, it was absolutely unfair and prejudicial and an abuse of discretion for the trial judge to permit such evidence in this case.

POINT IV

The District Court improperly permitted the government to violate the marital privilege of the defendant Dasti by the receipt in evidence of intercepted telephone conversations between Dasti and his wife.

As noted *supra*, in footnotes at pp. 18, 20 and 21, there were played or summarized for the jury four (4) telephone conversations between Dasti and his wife. An examination of those telephone conversations gives no indication that Mrs. Dasti participated in or was aware of any illegal activity in which her husband may have been engaged. In the absence of dual participation in crime, the confidences imparted by a husband to his wife are absolutely privileged and may not be used in evidence against him. *Wolfle* v. *United States*, 291 U.S. 7 (1934); *Blau* v. *United States*, 340 U.S. 332 (1951); *Ivey* v. *United States*, 344 F.2d 770 (5th Cir., 1965).

The fact that a privileged conversation may be intercepted during the course of even legitimate electronic surveillance does not deprive it of its privileged character. Thus, 18 U.S.C. § 2517(4) provides as follows:

> "No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of the provisions of this chapter, shall lose its privileged character."

Significantly, neither in the District Court's written opinion on this issue (A. 207), nor upon the argument of counsel for the exclusion of such evidence (A. 1847-1855) did either the Court or the prosecutor claim that Mrs. Dasti was a knowing participant in criminal activity. Instead, the District Court found that "[T]he marital privilege does not bar admission of conversations such as those involved here, which are *relevant* to the investigation of illegal activity." (A. 210). The point was re-emphasiz-

ed, "These conversations therefore are highly relevant to the crime, linking defendant Dasti to the alleged offense." (A. 210-11).

Presumably, whenever the government wishes to invade the privilege of a defendant, the evidence which it seeks to adduce is "relevant" to the inquiry. A standard such as that formulated by the District Court would render the marital privilege meaningless.

It is respectfully submitted that the use in evidence against the defendant of his private, innocent conversations with his wife violated both his and her marital privilege, and requires a reversal of Dasti's conviction.

CONCLUSION

For all the above reasons, it is respectfully submitted that the judgment of conviction should be reversed.

Respectfully submitted,

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APPENDIX

TABLE "A"

The Known Wiretaps

Code Name	*Place*	*Period*
Vegas 1B	Victoria Sporting Club	7/ 7/70 - 3/25/71
Vegas PT	Victoria Sporting Club	7/ 7/70 - 6/23/71
Vegas 3	Dasti Home	10/20/70 - 3/ 1/73
Vegas 4	Nicholas Di Iorio Home	10/22/70 - 11/ 3/70
Vegas 5	Cotroni Home	11/ 2/70 - 4/24/71
Vegas 7	Barber Shop	12/11/70 - 9/27/73
Vegas 8	Barber Shop	12/11/70 - 5/31/71
Vegas 9	Santo Mendola Home	12/10/70 - 7/24/72
Vegas 11	Cotroni Home	1/ 9/71 - 4/23/71
Vegas 12	Guido Orsini Home	1/10/71 - 2/16/71

TABLE "B"

Telephone Calls Used In Evidence*

Appendix	*Call #*	*Tap*	*Period*	*Parties and Location*	*Long Distance*
1756	1	1B	4 PM 12/30/70 - 4 PM 12/31/70	Oddo (New York) to Dasti (Canada)	N.Y.
1763	2	1B	4 PM - 8 PM 12/31/70	Oddo (New York) to Dasti (Canada)	N.Y.
1766	3	3	8 AM - 4 PM 1/ 1/71	Dasti (Canada) to Oddo (New York)	N.Y.
1772	4	3	8 AM - 4 PM 1/ 1/71	Dasti (Canada) to Cotroni (Canada)	
1781	5	1B	10 AM - 4 PM 1/ 2/71	Oddo (New York) to Dasti (Canada)	N.Y.
1786	6	1B	10 AM - 4 PM 1/ 4/71	Oddo & Vanacora (New York) to Dasti (Canada)	N.Y.
1791	7	1B	10 AM - 5:30 PM 1/5/71	Oddo & Vanacora (New York) to Dasti (Canada)	N.Y.
1793	8	1B	8 PM - Mid. 1/5/71	Oddo & Vanacora (New York) to Dasti (Canada)	N.Y.
1904	9	3	8 PM - Mid. 1/8/71	Dasti (Canada) to Wife (Canada)	
2009	10	5	8 AM - 8 PM 1/12/71	Dasti (New York) to Cotroni (Mexico)	N.Y.
2015	11	1B	10 AM - 8 PM 1/13/71	Dasti (Canada) to Wife (Canada)	
2019	12	PT	10 AM - 8 PM 1/15/71	Cotroni (Mexico) to Dasti (Canada)	Mex.
2025	13	1B	10 AM - 7:30 PM 1/15/71	Oddo (New York) to Dasti (Canada)	N.Y.
2025	14	Laurentian Hotel	10 AM 1/16/71	Oddo (New York) to Dasti (Canada)	N.Y.
2026	15	1B	10 AM - 8 PM 1/16/71	Oddo (New York) to Dasti (Canada)	N.Y.

* Recording available only for calls 1-17; remainder are summaries and memory. Appendix references are to point in the record where conversation is played for jury or summarized. Exact times of calls not available due to automatic recording system.

Appendix	Call #	Tap	Period	Parties and Location	Long Distance
2024	16	PT	10 AM - 8 PM 1/16/71	Dasti (Canada) to Cotroni (Mexico)	Mex.
2055	17	PT	10 AM - 8 PM 1/20/71	Dasti (Canada) to Cotroni (Mexico)	Mex.
1999	18	5	———1/10/71	Horvath (Canada) to Cotroni (Canada)	
2005	19	5	8 PM 1/10/71 - 8 PM - 1/11/71	Dasti (New York) to Cotroni Maid (Canada)	N.Y.
2006	20	5	8 PM 1/10/71 - 8 PM 1/11/71	Cotroni (Canada) to Cotroni Maid (Canada)	
2007	21	5	8 PM 1/11/71 - 8 PM 1/12/71	Cotroni (Canada) to Cotroni Maid (Canada)	
2016	22	3	8 PM 1/12/71 - 8 PM 1/13/71	Cotroni (Canada) to Dasti (Canada)	
2017	23	3	8 PM 1/13/71 - 8 PM 1/14/71	Dasti (Canada) to Wife (Canada)	
2052	24	1B	8 PM 1/16/71 - 8 PM 1/17/71	Dasti (Canada) to Wife (Canada)	
2053	25	3	8 PM 1/16/71 - 8 PM 1/17/71	Oddo (New York) to Dasti (Canada)	N.Y.
2054	26	PT	8 PM 1/19/71 - 8 PM 1/20/71	Orsini (Canada) to Dasti (Canada)	
2061	27	1B	8 PM 1/20/71 - 8 PM 1/21/71	Cotroni (Mexico) to Carlino (Canada)	Mex.
2062	28	1B	8 PM 1/20/71 - 8 PM 1/21/71	Carlino (Canada) to Dasti (Canada)	
2063	29	12	8 PM 1/20/71 - 8 PM 1/21/71	Orsini (Canada) to Cotroni (Mexico)	Mex.
2065	30	3	8 PM 1/20/71 - 8 PM 1/21/71	Dasti (Canada) to Orsini (Canada)	
2066	31	12	8 PM 1/21/71 - 8 PM 1/22/71	Cotroni (Mexico) to Orsini (New York)	Mex.
2118	32	3	8 PM 1/21/71 - 8 PM 1/22/71	Horvath (Canada) to Dasti (Canada)	